Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5091

DARNICE T. MALLOWAY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on September 2, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix A of this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1975. The jurisdiction of this Court is invoked under 28 U.S. Code Section 1254 (1).

QUESTION PRESENTED

Is the failure to name those whom the Government has probable cause to believe to be committing the crime for which an application to conduct electronic surveillance is sought fatal to any interception conducted thereunder?

STATUTES INVOLVED

18 U.S. Code Section 2518 (1)(b)(iv).

18 U.S. Code Section 2515.

STATEMENT OF THE CASE

The Petitioner was convicted of conspiracy to violate 18 U.S. Code Section 1952 and six counts of substantive violation of 18 U.S. Code Section 1952.

The Government learned of the Petitioner's activity through a wiretap authorized to intercept the calls of "Billy Cecil Doolittle and others as yet unknown." At the time that the application was made, there were several other targets whom the Government did in fact know.

Such omission consituted a fraud on the issuing judge.

REASONS FOR GRANTING THE WRIT

A wiretap constitutes a clear and potentially obtrusive invasion of privacy. In passing the Omnibus

Crime Control Act, the Congress sought to do two things:

1) To aid in the fight against crime.

2) To prevent abuse of electronic eavesdropping.

The intent of Congress is made clear by Section 2515:

> Any deviation from the prescribed guidelines results in an infection of all evidence obtained.

In the present case, the failure to disclose to the issuing judge all the facts required by the statute, makes fatal the entire tap. To hold otherwise would be to ignore the mandate of Congress. The prophylactic effect of suppressing all evidence obtained by the improper wiretap (including all the fruit of the poisonous tree) exists for good reason. Its function is to prevent abuses by law enforcement officers.

To make the Petitioner justify the suppression would be to place the burden where it does not belong. The issue is not whether the Petitioner was harmed. The issue is whether the Government acted improperly and unlawfully.

The Petitioner's position is supported by *United States* v. *Kahn*, 415 U.S. 143 (1974). In that case, this Court held that an investigative agency does not have to endeavor to learn the name of every possible suspect. The Court added at 415 U.S. 152, "This statutory language would plainly seem to require the naming of a specific person in the wiretap application *only when law enforcement officials believe that such an individual is actually committing one of the offenses specified in 18 U.S. Code Section 2516.*" (emphasis added).

CONCLUSION

It is respectfully submitted that certiorari should be granted. There is a conflict between the Circuits. There is an "important issue involving the construction of (The Omnibus Crime Control Act)." A fundamental constitutional issue, the right to privacy, hangs in the balance. The issue can, and should be resolved by this Court.

Respectfully submitted,

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